No. 86-1642

In The

Supreme Court of the United States

October Term, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, AND ENVIRONMENTAL DEFENSE FUND

RONALD J. WILSON
Counsel of Record
WILSON & COTTER
810 — 18th Street, N.W.
Washington, D.C. 20006
(202) 628-3160

QUESTIONS PRESENTED

1. Whether the Federal Power Act granted the Federal Energy Regulatory Commission such "exclusive" authority over hydropower licensing so that the ban on discharges of pollutants in the Clean Water Act, unless in compliance with a Clean Water Act permit, does not apply to hydropower projects licensed by the Commission?

2. Whether the Court of Appeals correctly held that the Federal Energy Regulatory Commission is not bound to apply the substantive requirements of Section 404 of the Clean Water Act?

CORPORATE LISTING STATEMENT

Respondents Sierra Club, West Virginia Highlands Conservancy, National Audubon Society, and Environmental Defense Fund, Inc., are corporations subject to Rule 28.1. They do not have any affiliated corporations. The National Wildlife Federation has two subsidiaries: National Wildlife Federation Endowment, Inc. and Wildlife Publications, Inc., a dormant corporation. National Wildlife Federation also holds a majority interest in DeSoto Greetings, Inc., a Maryland corporation doing business in Baltimore, Maryland. National Wildlife Federation Endowment, Inc. also owns with Resources For The Future, Inc., a District of Columbia corporation known as Square 181, Inc., which is the general partner in the Resources and Conservation Center, Ltd. Partnership. None of the corporations listed above has any publicly traded stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

TABLE OF AUTHORITIES—*(Continued)*

STATUTES **Page(s)**

REGULATIONS

TABLE OF AUTHORITIES—*(Continued)*

MISCELLANEOUS **Page(s)**

No. 86-1642

In The

Supreme Court of the United States

October Term, 1986

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, AND ENVIRONMENTAL DEFENSE FUND

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-1642

MONONGAHELA POWER COMPANY,
THE POTOMAC EDISON COMPANY,
AND WEST PENN POWER COMPANY,
Petitioners,

v.

JOHN O. MARSH, JR.,
LIEUTENANT GENERAL JOHN W. MORRIS,
COLONEL MAX R. JANAIRO, JR.,
AND COLONEL JOSEPH A. YORE,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS SIERRA CLUB, WEST VIRGINIA HIGHLANDS CONSERVANCY, NATIONAL AUDUBON SOCIETY, NATIONAL WILDLIFE FEDERATION, AND ENVIRONMENTAL DEFENSE FUND

Respondents Sierra Club, West Virginia Highlands Conservancy, National Audubon Society, National Wildlife Federation, and Environmental Defense Fund respectfully request this Court to

deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the District Court is reported at 809 F.2d 41 (D.C. Cir. 1987). A copy is reprinted as Appendix A to the petition. The Memorandum and Order of the District Court are reported at 507 F.Supp. 385 (D.D.C. 1980), *sub nom., Monongahela Power Co. v. Alexander*. A copy is reprinted at Appendix B to the petition.

STATUTES INVOLVED

The statutes involved are: Sections 4(e), 10(a), and 23(b) of the Federal Power Act, 16 U.S.C. §§ 797(e), 803(a), and 817; and Sections 301(a) and 404 of the Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a) and 1344. The text of these statutory provisions is set forth in Appendix D to the petition.

STATEMENT OF THE CASE

Nature of the Case

Section 301 of the Clean Water Act, 33 U.S.C. § 1311, bans all discharges of pollutants into the Nation's waters unless in compliance with a permit issued under other provisions of the Act. These other provisions include Section 402, which allows the Environmental Protection Agency (EPA) to issue permits in the case of point source discharges, and Section 404, which allows the Corps of Engineers to issue permits pursuant to regulations prescribed by EPA in the case of dredge and fill discharges. Section 404 is the principal tool crafted by Congress to protect the Nation's diminishing wetlands.

Petitioners here, Monongahela Power Company and two affiliated corporations (hereafter Monongahela), applied to the Corps for a Section 404 dredge and fill permit to construct a 1000 megawatt, pumped storage, hydroelectric project in Canaan Val-

ley, West Virginia known as the Davis Project. Acting pursuant to EPA's Section 404(b) guidelines[1] and its own regulations, the Corps denied the permit because the project would have filled or flooded more than 4000 acres of valuable wetlands, and because the Corps found that there were feasible alternative projects less damaging to the wetlands which would have produced the same amount of power.

Monongahela sought judicial review of the permit denial because, among other reasons, the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC)[2] had previously granted a license under the Federal Power Act to the Davis Project, which according to Monongahela, acted to oust the Corps' Clean Water Act jurisdiction. Monongahela argued that in enacting the Federal Power Act Congress intended to give the Commission such "exclusive" jurisdiction over hydro projects that subsequent, comprehensive Congressional enactments of general applicability would not apply to Commission licensed projects unless Congress specifically said so.

Ultimately, the Court of Appeals rejected Monongahela's argument, and this Petition for Certiorari followed.

Statement of the Facts

1. Canaan Valley's Wetlands

Canaan Valley is a broad, open valley perched high on the Allegheny Plateau at elevation 3200 feet. The Valley contains about 6000 acres of wetlands, accounting for about 39 percent of all the wetlands in West Virginia. (J.A. 613).[3]

---

[1]EPA's Section 404(b) guidelines are regulations with the force of law, promulgated after notice and comment in the Code of Federal Regulations. 40 C.F.R. § 230, *et seq*. Congress made the guidelines binding on the Corps and permit applicants. 33 U.S.C. § 1344(b).

[2]In 1977, the powers of the Federal Power Commission were transferred to various components of the newly created Department of Energy, which includes FERC. *See* Department of Energy Organization Act, 42 U.S.C. § 7172(a).

[3]The term "J.A." refers to the Joint Appendix filed in the Court of Appeals.

The value of Canaan Valley's wetlands has been universally acclaimed. The Valley was designated a Natural Landmark in the mid-1970's, 40 Fed. Reg. 19508 (May 5, 1975), after the Department of Interior characterized the Valley as "a high, large northern valley far south of its vegetational range" ranking "with Yosemite and Yellowstone Valleys."[4] Monongahela's own expert agreed in the FERC proceeding that the Valley "is a biological treasure house,"[5] and a FERC Law Judge found that "Canaan Valley is the largest example of bog, muskeg and swamp forest communities, with an exceptional variety of botanical features, in all of West Virginia and the adjoining states."[6] (J.A. 214). FERC described the Valley as "a unique area from the ecological viewpoint." (J.A. 244).

Finally, the District Engineer in denying the Section 404 permit, found that "Canaan Valley wetlands differ from other wetland areas in West Virginia because of their large size and great species diversity," and that the "muskeg forms the largest expanse of bog type vegetation known in the Appalachian Mountains"—"one of the largest of its kind in the eastern United States." (J.A. 687).

2. The FERC License Proceeding

In 1970, Monongahela applied to the Commission for a license for the Davis Project pursuant to the Federal Power Act. The State of West Virginia and the Sierra Club intervened. An environmental impact statement was prepared, and hearings were held on contested issues before an Administrative Law Judge in 1974.

On June 10, 1975, the ALJ rendered his Initial Decision in which he denied a license to the Davis Project because of the loss of substantial wetlands. (J.A. 156). The Judge concluded that "Canaan Valley in its present state represents a rare ecological phenomenon of extraordinary educational and scientific, aesthetical and recreational values." (J.A. 214).

---

[4]Evaluation of Canaan Valley, Tucker County, West Virginia For Eligibility As A Registered Natural Landmark, Dept. of Interior (Jan. 1974).

[5]Project No. 2709, FPC Transcript, Vol. 18, p. 2529.

[6]Muskeg is a sphagnum bog characteristic of wet, boreal regions, rare as far south as West Virginia. (J.A. 102).

Instead of licensing the Davis Project, the ALJ issued a license for a smaller project in Canaan Valley, known as the Glade Run alternative. The Glade Run alternative was similar to the Davis Project in most respects except that it had a drastically smaller lower reservoir—700 versus 7000 acres—and thus minimized the destruction of wetlands. (J.A. 194).

On review, the Commission reversed the ALJ and granted a license to the Davis Project. That decision, authored by then Commissioner James Watt, concluded that the recreational benefits from a large reservoir justified flooding the vast wetlands of the Canaan Valley. (J.A. 261).

While environmental issues were considered by the Commission, the key aspect of the Commission proceedings for this case is that Section 404 of the Clean Water Act played no role. Section 404 was enacted in 1972, EPA issued its Section 404(b) guidelines in 1975, 40 C.F.R. § 230, and also in 1975 the Corps of Engineers issued regulations which specifically provided that the Corps had jurisdiction over hydroelectric projects, 40 Fed. Reg. 31324 (July 25, 1975)—all well ahead of the issuance of the Power Act license for the Davis Project in 1977.

But neither Monongahela nor FERC ever identified Section 404 and its implementing regulations as applicable to the license proceeding, since Monongahela planned to seek a Section 404 license from the Corps at a later date.

3. The Corps of Engineers Permit Proceeding

On January 23, 1978, Monongahela filed an application for a Section 404, Clean Water Act permit with the Corps' District Engineer in Pittsburg. The Department of Interior, the State of West Virginia, the Environmental Protection Agency and the Sierra Club all filed extensive comments and evidence in opposition to a permit.

The Corps specifically reviewed the evidence before FERC, and concluded that the evidence with respect to Canaan Valley's wetlands was deficient. It therefore contracted with a biologist extensively experienced in wetlands to prepare a comprehensive study of the Valley. The 63 page Report submitted by Dr. H.W.

Vogelman developed considerable material about the extent, diversity, and comparable worth of the wetlands. The Report concluded that "the loss of this wetland complex would be an irreplaceable loss to West Virginia and the nation." (J.A. 49).

On July 14, 1978, the Corps of Engineers denied the permit. Specifically basing its decision on EPA's 404(b) guidelines, the Corps concluded that:

> 1. The Davis Power Project would alter and irreparably damage a significant national resource, the Canaan Valley wetland complex.
>
> 2. There are available alternative sites which would fulfill the same electrical energy needs and which are far less damaging to the natural environment.

Decision of District Engineer (J.A. 684).

4. The District Court Proceeding

Monongahela then sought to overturn in the District Court the denial of the Section 404 permit on a number of grounds. Prominent was the allegation that there is an inferred exemption to Section 404 of the Clean Water Act for hydroelectric projects subject to the licensing requirements of the Federal Power Act. After the State of West Virginia and the Sierra Club intervened as defendants, the District Court granted summary judgment for Monongahela, reaching only the jurisdictional claim based on the Federal Power Act. The District Court ruled that "an exemption for FPC-licensed projects from the licensing requirements of the FWPCAA must be inferred." 507 F.Supp. at 392.

5. The Court of Appeals Decision

The Court of Appeals reversed. 809 F.2d 41 (D.C. Cir. 1987). The Court noted Congress' intent in the Clean Water Act to address comprehensively the Nation's grave water pollution problems, and to ban all discharges unless in compliance with a Clean Water Act permit. The Court also stressed the Congressional "effort to halt the systematic destruction of the Nation's wetlands" in Section 404(a). 809 F.2d at 46. Then, in accord with this

Court's teaching that reviewing courts should defer to the administering agency's interpretation of Congressional enactments, avoid repeals by implication where possible, and reconcile statutes by giving maximum effect to each, the Court ruled that FERC licensed hydro projects must obtain a Section 404 permit from the Corps, thereby reaching the same result as the Second Circuit's prior decision in *Scenic Hudson Preservation Conference v. Calloway*, 499 F.2d 127 (2d Cir. 1974).

The Court stressed that FERC never purported to apply Section 404 to the Davis Project, and that FERC as an intervenor before the Court of Appeals advanced a theory quite different from Monongahela's position. 809 F.2d at 51, 53 n.114.

Monongahela's Suggestion For Rehearing En Banc was denied on March 24, 1987, and this petition followed.

REASONS FOR DENYING THE WRIT

There is no reason for this Court to review the decision below because it is consistent with the only other Circuit that has considered the issues presented by the petition. Both the District of Columbia and Second Circuits have agreed, without dissent, that the Clean Water Act's ban on discharges of dredge and fill material without a permit issued under Section 404 of the Act applies to hydroelectric projects licensed under the Federal Power Act. They have also agreed that application of Corps' jurisdiction to a hydro project does not effect a repeal by implication of any portion of the Federal Power Act.

Moreover, the issues raised here are not sufficiently important to warrant review because the Corps and FERC have been implementing their respective authorities for well over a decade in a harmonious manner, and have even memorialized their respective roles in a memorandum of understanding, attached as Appendix A. Thus, the Court of Appeals decision is consistent with both the Corps' long-standing interpretation of its authority under the Clean Water Act, and with years of administrative practice.

In addition, the Court of Appeals routinely applied well-established principles of statutory construction in a manner fully

consistent with this Court's rulings. The decision below follows this Court's precedents by harmonizing the Clean Water Act and the Federal Power Act in the only way that is (1) consistent with both the legislative intent and plain meaning of both statutes, (2) avoids a repeal by implication, and (3) accounts for the manner in which the Clean Water Act has been applied to other Federal regulatory programs.

Finally, the second question for which review is sought is not worthy of this Court's consideration because the Court of Appeals did not hold, as Monongahela suggests, that FERC "is not required to implement substantive environmental protections in discharging its obligation to issue hydropower licenses 'in the public interest'." (Petition at i). Rather, the Court held only that FERC is not charged by any statute with the duty to apply the specific, substantive requirements of Section 404 of the Clean Water Act, particularly as expressed in the Section 404(b) regulations promulgated by EPA.

I.

THE DECISION BELOW IS CONSISTENT WITH BOTH THE SECOND CIRCUIT'S PRIOR DECISION AND THE LONG-STANDING ADMINISTRATIVE INTERPRETATION OF THE CORPS OF ENGINEERS, THE AGENCY RESPONSIBLE FOR ADMINISTERING SECTION 404

Review is not warranted because the Circuits are in accord and because the decision is consistent with more than a decade of administrative practice of both the Corps and FERC in exercising the responsibilities imposed by both the Clean Water and Federal Power Acts.

The issues raised here were first presented to a Court of Appeals in *Scenic Hudson Preservation Conference v. Callaway*, 370 F.Supp. 162 (S.D. N.Y. 1973), *aff'd per curiam*, 499 F.2d 127 (2d Cir. 1974). In that case, first District Judge Lasker and then the Second Circuit ruled that Sections 301 and 404 of the Clean Water Act were applicable to a hydro project licensed by the

Commission. These decisions are in accord with a Court of Claims holding in a comparable case that "the Federal Power Act is not immune from effects of other subsequent acts of Congress of general application." *Appalachian Power Co. v. United States*, 607 F.2d 935, 941 (Ct. Cl. 1979), *cert. denied*, 446 U.S. 935 (1980).

The *Scenic Hudson* case was filed within a few months of the passage of the Federal Water Pollution Control Act Amendments, enacted in late 1972, and raised the issue of the Corps' Section 404 jurisdiction for the first time. The Corps' initial, litigious reaction was to claim that Sections 301 and 404 were "inapplicable" to hydro projects. On more mature reflection in rulemaking, the Corps agreed that a Section 404 permit from the Corps is required, and so advised the court. 370 F.Supp. at 164.

The Corps has consistently maintained this position ever since. Although Monongahela asserts that the Corps began to require Section 404 permits for hydroelectric projects only after FERC granted a permit for the Davis Project (Petition at 7), this contention is factually inaccurate. The Corps adopted binding regulations in 1975 requiring Section 404 permits for such projects, nearly two years before FERC granted Monongahela a permit. 40 Fed. Reg. 31324 (July 25, 1975). In fact, the Corps proposed this regulation in May 1973, only five months after Congress enacted Section 404. 38 Fed. Reg. 12218 (May 10, 1973). This policy has remained unchanged to this day, as the Court of Appeals noted. 809 F.2d at 49 & n.81.

The decision below also lacks general significance as shown by the fact that the Corps rules on about 11,000 Section 404 applications per year.[7] The precise question here has been presented to appellate courts only twice in the 14 years since Congress enacted Section 404 and the Corps concluded that hydroelectric projects are subject to Section 404. Thus, the issue raised by Monongahela is not of particular concern to the hundreds

---

[7]Office of Technology Assessment, Congress of the United States, OTA-0-206, Wetlands: Their Use and Regulation 141 (1984).

of project sponsors who must comply with Section 404 and obtain FERC permits.

This is because the Corps has effectively implemented this requirement ever since 1975. It has received willing compliance from the electric utility industry, as it did from Monongahela here, at least initially. Just as Monongahela applied for a Section 404 permit as a matter of course, so do all hydropower developers who construct under Federal Power Act licenses. Denials have been so rare that the Corps' jurisdiction has not been a matter of controversy.[8]

In recognition of this administrative practice, the Corps and FERC in 1981 entered into a Memorandum of Understanding which details the manner in which the two agencies will coordinate the exercise of their respective jurisdictions. (Attached as Appendix A). So far as we can tell, there has been no difficulty whatever in the implementation of this Memorandum. And of course, FERC has emphasized the slight importance of this case to the administration of the Federal Power Act by declining to seek certiorari.

II.

THE DECISION BELOW HARMONIZES THE COMPREHENSIVE NATURE OF BOTH THE CLEAN WATER ACT AND THE FEDERAL POWER ACT IN A MANNER CONSISTENT WITH THE PRECEPTS OF THIS COURT

The Court of Appeals was faithful to the teachings of this Court that repeals by implication are not favored and that, absent a literal conflict in the words of two enactments, federal courts

---

[8]Congress has twice substantially amended the Clean Water Act since the Corps asserted jurisdiction, and its deliberations do not reflect any consideration of the issue. *See infra* at note 10.

should seek to harmonize the laws to give maximum effect to each. *E.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *Compare* 809 F.2d at 53.

The first of the laws at issue here, the Clean Water Act, is comprehensive in nature, and prohibits all discharges of pollutants without a Clean Water Act permit. Congress has repeatedly emphasized its intent that the Clean Water Act apply to all discharges of pollutants into the Nation's waters:

> The 1972 Federal Water Pollution Control Act exercised comprehensive jurisdiction over the Nation's waters to control pollution to the fullest constitutional extent possible.

4 Leg. Hist. 708.[9]

This Court has frequently noted the pervasive nature of the Clean Water Act's scheme. *See, e.g.*, *Train v. City of New York*, 420 U.S. 35, 37 (1975) ("a comprehensive program for controlling and abating water pollution").

The Clean Water Act is quite plain. It states in Section 301(a), 33 U.S.C. § 1311(a):

> Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this title, the discharge of any pollutant by any person shall be unlawful.

Sections 301, 302, 306, and 307 provide for the establishment of effluent limitations which shall be applied to individual discharges through a permit system operated in accordance with Sections 318, 402, and 404. Thus, on its face, the only way to discharge pollutants legally is with a permit issued under these permitting provisions—Section 404 in the case of the discharge of dredge and fill material.

---

[9]The legislative history of the Clean Water Act has been reprinted in four volumes, A Legislative History of the Water Pollution Control Act of 1972 and 1977, (Comm. Print 93-1), 93rd Cong., 1st Sess. (1973), (Comm. Print 95-14), 95th Cong., 2d Sess. (1978), hereafter cited "Leg. Hist."

The House Report explaining Section 301 was quite specific:

> Any discharge of a pollutant without a permit issued by the Administrator under section 318, or by the Administrator or the State under section 402 or by the Secretary of the Army under section 404 is unlawful.

1 Leg. Hist. 787.

As the Court of Appeals warned, Monongahela's contentions here would create "a double-barreled exemption" to the mandates of the Clean Water Act. 809 F.2d at 50. A hydroelectric project would escape both the ban on discharges in Section 301 and the permit requirement of Section 404. This is because there is no way for FERC to grant a Section 404 permit. It is not authorized to do so by the Clean Water Act, nor is it prepared or equipped to do so under its own procedures and regulations.[10]

Monongahela would nevertheless infer this "double-barreled exemption" in a two step process that ignores the plain language of Sections 301 and 404 and the legislative intent animating the Clean Water Act. First, Monongahela emasculates the wetlands protective thrust of Section 404 by claiming that Section 404 was designed only to preserve existing Corps' authority under the Rivers and Harbors Act, 30 Stat. 1121 (1899). Petition at 15. Second, Monongahela inaccurately posits that the Federal Power Act was designed to grant FERC "exclusive" jurisdiction over hydro projects in the sense that no subsequent Congressional enactment of general applicability could provide another overseer unless Congress specifically said so—no matter how comprehensive that

---

[10]The Court of Appeals properly regarded as significant Congress' failure in 1977 to create a specific exemption from Section 404 for hydro projects licensed by FERC. 809 F.2d at 51. The *Scenic Hudson* decision, *supra*, had invited Congress to address the issue, 370 F.Supp. at 170, and the Clean Water Act amendments extensively revamped Section 404 without mentioning the problem. More significantly, Congress did exempt other activities from Section 404, including "Federal project[s] specifically authorized by Congress," but only if the Section 404(b) guidelines are considered in an environmental impact statement submitted to Congress. It is inherently incredible that Congress would exempt Congressionally authorized projects only if they undergo consideration of Section 404(b) factors, and yet intend FERC licensed projects to escape Section 404(b) review under an inferred exemption.

subsequent statute. However, the authority relied on by Monongahela does not support its argument. More importantly, Monongahela's position is contradicted by the way FERC has integrated Section 401 of the Clean Water Act into its implementation of the Federal Power Act and the way the Clean Water Act has been applied to natural gas projects licensed by FERC under the Natural Gas Act, another comprehensive regulatory scheme.

A. Section 404 Is A Comprehensive, Wetlands Protection Provision

Monongahela belittles Section 404 by urging that it "was intended merely to preserve some of the Corps' former jurisdiction, not expand it." Petition at 15. The legislative history cited to support this contention is inaccurate. To be sure, Senator Ellender offered an amendment to the bill before the Senate adding a new section numbered 404 that covered only "the discharge of dredged materials into navigable waters." 2 Leg. History at 1386.

But Senator Ellender's amendment did not become law, and it differs materially from the jurisdiction actually conferred on the Corps. As enacted, Section 404 substantially expanded Section 404 in ways that have convinced the judiciary that the Corps' authority over wetlands has been increased.

First, authority over the discharge of *fill* material was added to Section 404(a), clearly demonstrating that the section was meant not only to address the issue of *disposal* of dredged material but also discharges of fill material of the type required to create an impoundment for a hydroelectric project. Secondly, Section 404(b)(1) expressly gave EPA the authority to promulgate "guidelines," which are actually binding regulations, and mandated that the Corps follow these guidelines in deciding whether to issue permits. Third, Section 404(c) provides EPA with absolute power to veto Section 404 permits for a broad range of reasons. Nothing in the Rivers and Harbors Act gives any agency other than the Corps power to establish criteria for permit issuance or to veto Corps permits.

Contrary to what Senator Ellender intended with his unsuccessful amendment, Congress in 1972 gave the Corps and EPA substantially broader powers to control the placement of dredged and fill material into the Nation's waters than any authority conferred on the Corps by the Rivers and Harbors Act.

Given Congressional intent to protect the Nation's wetlands in Section 404,[11] there is nothing unusual about the Court of Appeals' approach to the issue presented by Monongahela. The Court of Appeals looked at the plain language of the discharge prohibition of Section 301 and the permit requirement of Section 404, examined the legislative history of the Clean Water Act, considered the overall statutory scheme of the Act to divine Congress' intent and paid deference to the Corps' interpretation of its jurisdiction. This is perfectly consistent with the countless decisions by this Court establishing the principles to be applied in statutory interpretation. *United States v. Riverside Bayview Homes, Inc.*, __ U.S. __, 106 S.Ct. 455, 461-463 (1985); *Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985); *North Dakota v. United States*, 460 U.S. 300, 312 (1983).

Moreover, the Court of Appeals' conclusion that Section 404's permit requirement applies to any discharge of dredged or fill material, including those associated with hydroelectric projects, is supported by existing case law. Numerous federal court decisions

---

[11]The 1977 Senate debates highlighted the expansive nature of Section 404:

> The Section 404 process is an essential tool for preventing the unnecessary degradation of water quality by discharges of dredged or fill material. Without it, critical aquatic areas including swamps, marshes, and submerged grass flats, which are such an important segment of this Nation's water resource and are essential to the preservation of migratory and resident fish, bird and other animal populations, might otherwise be irrevocably destroyed.
>
> The lasting benefits that society derives from coastal and inland wetlands often far exceed the immediate advantage their owners might get from draining or filling them; we are losing wetlands at the rate of some 300,000 acres per year. The committee recognizes the need for a program which regulates the discharge of dredged or fill material into our waters and wetlands.

4 Leg. Hist. 644.

have addressed the issue of Section 404's jurisdictional scope. *E.g.*, *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984); *Avoyelles Sportmen's League v. Marsh*, 715 F.2d 897 (5th Cir. 1983); *United States v. Texas Pipe Line Co.*, 611 F.2d 345 (10th Cir. 1979); *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979); *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). Only one published decision (save for the one corrected by the Court of Appeals) has ever held that a discharge literally within the terms of Section 404(a) and not expressly exempted by some other provision of Section 404 falls beyond the Corps' regulatory authority. That one case was reversed by a unanimous decision of this Court. *United States v. Riverside Bayview Homes, Inc.*, __ U.S. __, 106 S.Ct. 455 (1985).[12]

In short, Monongahela cannot dodge Section 404 by claiming that Section 404 simply reenacted the Corps' preexisting authority.

B. The Authority Relied on By Monongahela Does Not Support Its Position

Monongahela advances several arguments in support of its claim that FERC has "exclusive" jurisdiction over hydro projects. None have merit.

First, the Power Act was not enacted to bar all future regulation by any entity but FERC. Rather, its purpose was to place the then balkanized Federal regulation of hydro projects into one agency. While Congress was surely exercising the full extent of its Commerce power to the exclusion of the states, *First Iowa Hydro-*

---

[12]Although most of these cases, including *Riverside Bayview*, considered the scope of Section 404 authority over wetlands as "navigable waters," the controlling principle is the same as the one invoked by the Court of Appeals. The Clean Water Act represents a conscious effort by Congress to create broad, far-reaching federal regulatory authority over specified types of discharges into the Nation's waters and unpermitted discharges are strictly prohibited unless expressly exempted. *See, e.g.*, *Riverside Bayview*, *supra*, 106 S.Ct. at 462. Monongahela cannot and does not argue that the type of discharge necessary to create the Davis Project fails to come within the terms of Section 301's blanket ban of unpermitted discharges, or that it comes within any express exemption in Section 404.

Electric Coop v. *FPC*, 328 U.S. 152 (1946), it was not constraining itself from future regulation of hydro projects. The legislative history of the Power Act is replete with references to the effect that Congress was intent on centralizing only existing authority in a single agency. The purpose of the Power Act was set forth explicitly as:

> [To coordinate] the activities of the three departments which have to do with water power, in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions, or conflict of authority.[13]

Second, this Court's decision in *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), rather than supporting Monongahela, stands squarely for the proposition that facilities regulated by Federal agencies with "comprehensive" and "pervasive" regulatory authority are nevertheless subject to the permit requirements of the Clean Water Act. This is because the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.*, like the Federal Power Act, vests in the Atomic Energy Commission (now the Nuclear Regulatory Commission) a "comprehensive regulatory scheme" over nuclear generating stations. 426 U.S. at 4. But despite this parallel "comprehensive regulatory scheme," the issue addressed by the Supreme Court was not whether the AEC had "exclusive jurisdiction" over all permitting matters relating to nuclear plants licensed by the AEC. Rather, the issue was whether the discharged "nuclear materials are 'pollutants' within the meaning of FWPCA." 426 U.S. at 4. This is an issue this Court never needed to reach if the AEC had "exclusive jurisdiction" in the sense that no other agency could issue permits for the plant.

But this Court did undertake an analysis of the Clean Water Act to determine whether source materials, by-products, and special nuclear materials are pollutants within the meaning of the Clean Water Act. It found specific statements and direct evidence in the legislative history that Congress did not intend these three types of nuclear pollutants to be subject to EPA permits.

---

[13]Water Power Hearings before the House Water Power Committee, 65th Cong., 2d Sess. at 26 (1919).

The key aspect of *Colorado PIRG* for this case is that the nuclear plant involved there, and other nuclear plants, discharge other pollutants which are in fact subject to Clean Water Act permits. EPA has specific regulations that cover the discharge of radium and accelerator produced isotopes, 40 C.F.R. § 122, p. 60 (1986), and these, as well as other pollutants such as blow down water from cooling towers, are in fact subject to Section 402. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir. 1978), *cert. denied*, 439 U.S. 824 (1978).

Third, the Department of Energy Organization Act of 1977 did not confirm that FERC has "exclusive jurisdiction" over hydro projects to the exclusion of all other Federal agencies. Petition at 13. Monongahela cites a fragment of a sentence in the Conference Report. But in the context of the entire Conference Report and in light of Congress' objectives in the DEO Act, the "exclusive jurisdiction" referred to in the Conference Report was simply exclusive jurisdiction to grant licenses *under the Power Act*, without interference or further review by the Secretary of Energy or other federal executives. The need for the statement in the Conference Report stemmed from a concern that the Secretary of Energy might somehow become involved in FERC's Power Act functions. The DEO Act took the Power Act duties previously performed by an independent agency, the FPC, and transferred them to FERC, an agency within the Department of Energy and, at least organizationally, subordinate to the Secretary. Congress' concern is reflected in the passages in the Conference Report immediately following the statement relied on by Monongahela. H.R. Conf. Rep. No. 539, 95th Cong., 1st Sess. 76, reprinted in 1977 U.S. Code Cong. & Adm. News 947. It is further reflected throughout the legislative history, including the floor debates. *See, e.g.*, 123 Cong. Rec. 26114, Col. 1 (Aug. 2, 1977) (remarks of Cong. Dingell).

The Report reflects Congress' intent that FERC have the same jurisdiction as the FPC previously had—no more and no less. This is why the Conference Report states that FERC gets the Power Act licensing functions of the FPC and that others cannot interfere with those functions, and why it does not say that other federal agencies

acting under statutes other than the Power Act are prohibited from carrying out their statutory duties.[14]

Finally, Monongahela claims the recent passage of the Electric Consumer Protection Act of 1986 (ECPA), Pub. L. No. 99-495, 100 Stat. 1243 (1986), is "an express reaffirmation" of the view that FERC is the sole agency responsible for reviewing hydro projects under environmental requirements, and chastizes the Court of Appeals for not discussing ECPA. Petition at 13-14.[15] To the extent ECPA is relevant, it confirms that Congress has finally lost patience with FERC's implementation of the policies embedded in the Nation's environmental laws, and would not entrust sole administration of the Clean Water Act to a "prodevelopment" agency. *See* remarks of Cong. Dingell, 132 Cong. Rec. H. 8955 (Oct. 2, 1986); H.R. Rep. 99-934, 99th Cong., 2d Sess. 23-26 (1986).

---

[14]FERC's implementation of its Natural Gas Act authority, also transferred to it under the DEO Act, refutes Monongahela's expansive reading of the words "exclusive jurisdiction" in that Act. Section 301 of the DEO Act, 42 U.S.C. § 7151(b), transferred all the functions of the FPC to the Secretary of Energy, except those functions delegated to FERC in Sections 401-408. It is one of these sections, Section 402(a), 42 U.S.C. § 7172(a), which transferred to FERC authority to issue Federal Power Act licenses for hydroelectric projects, and which the Conference Report referred to as embodying the "exclusive jurisdiction" of the Commission.

But Section 402(a) also transferred to FERC certain of the FPC's functions under the Natural Gas Act, including for example the issuance of a certificate of public convenience and necessity under Section 7 of that Act. Yet no one could seriously contend that FERC has "exclusive jurisdiction" over natural gas facilities in the sense Monongahela argues that FERC has exclusive jurisdiction over hydroelectric facilities. To be sure, the Natural Gas Act creates a rather comprehensive regulatory scheme. But there is also regulation by other federal agencies, and even the states. For example, the Economic Regulatory Administration in the Department of Energy has authority under Section 3 of the Natural Gas Act to authorize the import of gas for FERC approved facilities, thus giving ERA an effective veto over some projects. 42 U.S.C. § 7172(a). EPA and the States also issue Clean Water Act permits to natural gas facilities licensed by FERC. *See infra* at 20.

[15]Monongahela's recent emphasis on ECPA is surprising since Monongehela did not deem ECPA important enough at the time of enactment to call it to the Court of Appeals' attention under Federal Rules of Appellate Procedure, § 28j.

ECPA admonishes FERC to upgrade its consideration of environmental values in licensing proceedings. ECPA, Section 3, 16 U.S.C. §§ 797(e), 803(a)(j). ECPA never mentions EPA and the Corps, the agencies responsible for water pollution control, does not address water pollution or Section 404, and simply has no relevance to the issues presented in the petition. This Court has often admonished that subsequent legislation cannot alter the meaning of prior legislation when it does not address that prior legislation. *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 785-788 (1981).

C. Monongahela's Position Is Inconsistent With The Way The Clean Water Act Has Been Applied In Comparable Situations to Facilities Subject to FERC's Jurisdiction Under the Federal Power Act and the Natural Gas Act

Section 401 of the Clean Water Act provides that no Federal license or permit to conduct an activity that creates a discharge may be granted unless a water quality certificate has been obtained from the pertinent state. 33 U.S.C. § 1341(a). The language of Section 401(a) is comprehensive, applying on its face to all applicants for a Federal license or permit. There is no specific statement in the language of Section 401(a) that Congress wanted Section 401(a) to apply to applicants for Power Act licenses. As a result, FERC has routinely imposed this requirement on its applicants for Power Act licenses, *e.g.*, 50 Fed. Reg. 32229 (Aug. 9, 1985), and FERC's brief below conceded applicability. See Brief for Intervenor-Appellee Federal Energy Regulatory Commission (hereafter "FERC Br.") at 25 (Nov. 16, 1981). Monongahela complied with Section 401(a) by obtaining a Section 401(a) water quality certificate from the State of West Virginia. (J.A. 437-440, 686).

Section 301's ban on discharges without a permit is equally comprehensive. There is simply no basis in the language, legislative history, or policies of the Clean Water Act for suggesting that Power Act applicants must obtain a Section 401(a) certificate, but not a Section 404 permit which allows them to escape the ban on

discharges in Section 301. Monongahela offers no reason for ignoring the plain language employed by Congress in the Clean Water Act other than its repetitious and unilluminating reference to the Power Act as a "comprehensive statutory scheme."

Similarly, as noted in Section B above, FERC also administers the Natural Gas Act, 16 U.S.C. § 717, *et seq.*, "a comprehensive scheme of federal regulation" over the interstate transmission of natural gas. *See Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 91 (1963). Nevertheless, natural gas pipelines must routinely apply for Section 402 and 404 permits for the discharges caused by the construction of the pipelines. 18 C.F.R. § 157.206(d)(2)(i). The applicant for the most controversial pipeline project currently pending before FERC has recently filed an application for a Section 404 permit with the Corps.[16]

The Court of Appeals decision properly reconciles this administrative practice with both the Clean Water Act and the Federal Power Act.[17]

---

[16]*See* Iroquois Gas Transmission System, Natural Gas Pipeline Request for Department of the Army Permit, File 25.22.02.04-05/06, before U.S. Army Corps of Engineers, New York Division (March 11, 1987).

[17]Monongahela cites with alarm a recent District Court ruling that a hydro project discharging tons of dead fish parts is required to obtain a Section 402 discharge permit. Petition at 20. Not only is *National Wildlife Federation v. Consumers Power Co.*, No. G85-1146 (W.D. Mich. March 31, 1987), correctly decided, it is an exceedingly narrow ruling limited by the court to its own facts.

III.

THE COURT OF APPEALS DID NOT RULE THAT FERC HAS NO SUBSTANTIVE ROLE UNDER THE NATION'S ENVIRONMENTAL LAWS; RATHER, IT CORRECTLY RULED ONLY THAT FERC IS NOT BOUND, AND DID NOT IN THIS CASE APPLY, THE SUBSTANTIVE REQUIREMENTS OF SECTION 404

The second issue raised by Monongahela's petition purports to challenge a ruling that the Court of Appeals never made. According to Monongahela, the Court of Appeals ruled that FERC has no substantive environmental role in the issuance of hydropower licenses. Petition at 21. In fact, the Court of Appeals made no such ruling. Rather, it held that FERC does have a duty to account for environmental considerations and policies in the balancing process that informs FERC licensing. 809 F.2d at 52. The Court of Appeals ruled only that "the explicit conservation-oriented Section 404(b)(1) directives under which the Corps labors have nowhere been matched in the mandate given FPC." 809 F.2d at 52.

Therefore, the second question presented in Monongahela's petition is not properly before this Court.

With respect to the narrow issue actually decided by the Court of Appeals—that FERC is not bound by Section 404—Monongahela cannot identify a single case or other authority for the proposition that FERC is obligated to follow the specific, substantive requirements of the Clean Water Act. As conceded by Monongahela, the cases it relies on, most prominently *Udall v. FPC*, 387 U.S. 428, 437-444 (1967), hold only that FERC's "public interest" standard must be evaluated "with reference to the contemporary national environmental policies established by Federal laws." Petition at 22.

Moreover, FERC's theory as an Intervenor in the Court of Appeals is at odds with a specific duty under Section 404. There, FERC insisted it had "exclusive" authority over hydro projects under the Federal Power Act, and that it has "environmental

protection obligations under Section 10(a) of the Federal Power Act" and the National Environmental Policy Act, 42 U.S.C. § 4321; but FERC never once suggested that it was bound to apply the substantive requirements of Section 404. *See* FERC Br. at 27-29. In supplemental briefing specifically requested by FERC, the Commission urged that hydroelectric projects were subject to the Clean Water Act only in a two-step review process. First, the states perform a review under Section 401 of the Clean Water Act "to insure that the discharge will comply with all water quality standards."[18] The second review is performed by the Commission under the Federal Power Act and "involves a balancing of all factors relevant to a determination that the activity as proposed best serves the public's interest." Supplemental Memorandum of the Federal Energy Regulatory Commission, at 2 (July 2, 1982). As the Court of Appeals observed, Section 404 plays no role in this analysis. 809 F.2d at 49.

The most noteworthy aspect of FERC's position below is that it confirms the Court of Appeals' view that FERC is bound only to engage in a balancing process. Thus, FERC's view of its responsibilities is totally at odds with Monongahela's position that FERC is bound to apply the substantive Section 404 criteria.

FERC's conduct in the Monongahela licensing proceeding also belies Monongahela's view that Federal Power Act permits are issued by FERC in accord with Section 404 and EPA's implementing regulations, which in turn must be based on the effects of the discharge on, among other things, health, wildlife, aesthetics, recreation, and other environmental protection matters. 33 U.S.C. §§ 1344(b), 1343(c). The Section 404(b) regulations in force at the time this case was reviewed by FERC were even more specific in imposing substantive standards that go beyond the requirements of

---

[18]Section 401(a) of the Clean Water Act requires "any applicant for a Federal license or permit" which may result in a discharge of pollutants to obtain a certificate from the pertinent State that the discharge will comply with specified water quality provisions of the Act. A license may not issue if a certificate is denied.

the Power Act and NEPA. 809 F.2d at 50, n.100. The regulations initially admonished that "the guiding principle should be that destruction of highly productive wetlands may represent an irreversible loss of a valuable aquatic resource." 40 C.F.R. § 230.4-1(a)(1) (1978).[19]

The regulations also imposed a burden on applicants not imposed by the Federal Power Act:

> Discharge of fill material in wetlands shall not be permitted unless the applicant clearly demonstrates the following:
>
> (a) The activity associated with the fill must have direct access or proximity to, or be located in, the water resources in order to fulfill its basic purpose, or that other site or construction alternatives are not practicable; and
>
> (b) That the proposed fill and the activity associated with it will not cause a permanent unacceptable disruption to the beneficial water quality uses of the affected aquatic ecosystem, or that the discharge is part of an approved Federal program which will protect or enhance the value of the wetlands to the ecosystem.

40 C.F.R. § 230.5(b)(8)(ii) (1978).

Here, FERC did not perform the kind of Section 404 review mandated by the Clean Water Act and EPA's regulations. FERC's environmental impact statement does not mention Section 404, does not identify the fill required, and is extremely cursory in its treatment of wetlands. (J.A. 336, 345). The EIS does not, for example, attempt to compare the magnitude and diversity of the Canaan Valley wetlands with other wetlands in the Eastern United States. And of course, the Section 404(b) regulations were not mentioned or applied, even though they in fact were promulgated before the license here issued. *See* 40 Fed. Reg. 41292 (Sept. 5, 1975).

---

[19]EPA's current Section 404(b) regulations contain comparable prescriptions. *See* 40 C.F.R. § 230.10(a) (1986).

The truth of the matter is that in considering the Davis Project, FERC had no notion that it would have the kind of responsibility assigned to it by Monongahela. No one claims that FERC performed a Section 404 review or applied the criteria in EPA's regulations, only that it conducted a general environmental review under other statutes.

By contrast, the Corps took its Section 404 responsibilities seriously. Its entire review of Monongahela's permit application emphasized the Canaan Valley's wetlands. It commissioned a specific study to determine their extent and value in comparison to other wetlands, a step FERC never considered. And its decision was based on the value of these outstanding wetlands, as mandated by the Section 404(b) guidelines.

Ultimately, if the Section 404(b) regulations are applicable to the Davis Project, the decision to issue a permit to fill Canaan Valley's wetlands should have turned on whether there was a practicable alternative available. That criterion informed the Corps' decision when the Corps found that the Glade Run alternative could minimize the destruction of wetlands. It did not inform the FERC decision even after the Administrative Law Judge had found Glade Run to be a practicable alternative. FERC made no finding that Glade Run was not practicable. Rather, it engaged in its usual balancing process and elevated recreation over wetlands in selecting the Davis Project. (J.A. 224-256.)

Thus, not only was the Court of Appeals correct that FERC is not bound by Section 404 and its implementing regulations, it was also correct in observing that in this case FERC in fact did not apply Section 404.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Ronald J. Wilson
Counsel of Record
WILSON & COTTER
810—18th Street, N.W.
Washington, D.C. 20006
(202) 628-3160

Counsel for Respondents
Sierra Club, et al.

APPENDIX

APPENDIX A

MEMORANDUM OF UNDERSTANDING BETWEEN THE

FEDERAL ENERGY REGULATORY COMMISSION AND THE DEPARTMENT OF THE ARMY

REGARDING

NON-FEDERAL HYDROPOWER DEVELOPMENT

In the interest of mutual cooperation for expediting non-Federal hydropower development, the Federal Energy Regulatory Commission, hereinafter referred to as the Commission, pursuant to the authority contained in the Federal Power Act, as amended; 16 U.S.C. Sec. 791 a *et seq*, and the Department of the Army hereinafter referred to as the Army, pursuant to the interdepartmental work provision of 47 Stat. 417 (31 U.S.C. Section 686), enter into this Memorandum of Understanding (MOU);

WHEREAS, the Commission is responsible for issuing preliminary permits and licenses to non-Federal entities for the development of hydroelectric power plants under its jurisdiction, including power plants utilizing Federal dams where Congress has not authorized power development as a project purpose.

WHEREAS, the U.S. Army Corps of Engineers, hereinafter referred to as the Corps has constructed water resources projects throughout the nation where a potential exists for the development of hydroelectric energy and is agreeable to the development of hydropower by non-Federal entities, provided that in any license issued by the Commission, hydroelectric development is found by the Commission to be compatible with the purposes for which Congress authorized the project, and provided Federal hydroelectric facilities have not been authorized by Congress for construction;

WHEREAS, the Army has certain regulatory responsibilities and the Army and the Commission wish to take all possible steps to reduce regulatory burdens and minimize duplication of Federal review;

WHEREAS, both the Commission and the Army wish to encourage non-Federal hydropower development;

PART I

NOW THEREFORE, in consideration of mutual cooperation and the encouragement of developing renewable resources by the promotion of hydroelectric energy at existing and future Corps' facilities, the Commission and the Army agree to the following:

1. Feasibility Study of Hydropower Potential

a. The Commission will require, in its preliminary permits authorizing feasibility studies of a facility at a Corps of Engineers' dam that the Permittee coordinate those studies for a proposed project with the appropriate Corps' District Engineer. This is to ensure that the feasibility studies will result in a plan of development consistent with the authorized purposes including operations, of the Federal project.

b. At the initial meeting between the Corps and the Permittee, which shall be requested by the Permittee, the Corps will provide to the Permittee all pertinent general information as is available on: status and content of District's studies relating to hydropower; physical constraints at the Corps facilities relating to hydropower development; requirements for design, construction, and hydraulic model studies, if necessary; requirements to avoid adverse impact on other project purposes; and other items or conditions that may affect the Permittee's studies for the proposed power plant. The Permittee shall be responsible for conducting, at its own expense, all necessary technical studies and documentations, including reports, drawings, etc. in such scope and detail that are needed to confirm technical and operational feasibility of a proposed power plant at a Corps' site.

2. Design, Construction and Operation

a. The licensed hydropower facilities that will be an integral part of or that could affect the structual integrity or operation of the Corps' project shall be designed and constructed in consulta-

tion with and subject to the review and approval of the appropriate Corps' District Engineer.

b. The Corps' approval of the final design with regard to impact on navigation will be exercised under Section 4(e) of the Federal Power Act for all proposed non-Federal hydropower facilities at the Federal site.

c. The Commission will require Licensees to reimburse the Corps directly for all reasonable costs associated with the Corps' review and approval of the design and construction, plans and specifications, and the inspection of construction, cited in paragraph 2a and 2b above, for power development at Corps' projects, provided that charges shall not be assessed for information, services, or relationships that would normally be provided to the public. The Corps will bill the Licensee for costs directly related to the review of design and construction of those licensed facilities that affect the integrity or operation of the existing project structures. Disagreement by either the Licensee or the Corps regarding reimbursement will be referred to the Director, Office of Electric Power Regulation or successor office, hereinafter (OEPR) for resolution. Such reimbursable costs shall be limited to those associated with design approval and construction, and shall not include those costs related to commenting on permit and license applications pursuant to Section 4(e) of the Federal Power Act. Licensee shall comply with 16 U.S.C. Sec. 804 and all such other provisions of the Federal Power Act as may be appropriate.

d. Copies of all correspondence between the Licensee and the Corps regarding the schedule and progress of the design review and approval will be provided to the Commission's appropriate Regional Engineer. The Regional Engineer will not authorize construction of the facility to start until the Corps' District Engineer's written approval of the construction plans and specifications has been received by Regional Engineer or his designee.

e. The Commission's Regional Engineer will be responsible for surveillance of the construction activities within the licensed project boundary. The Licensee's proposed construction inspection program will be furnished to the Corps for review and comment prior to approval by the Regional Engineer. The con-

struction of the facilities will be inspected by the Regional Engineer's staff during construction of the project, generally at monthly intervals. Copies of the reports of these inspections will be furnished to the Corps. The Corps shall perform periodic or continuous inspections at critical stages of the construction of those portions of the licensed project works that, in the judgment of the Corps, may affect the integrity or operation of existing project structures. A schedule or Corps' proposed inspections will be furnished to the Regional Engineer. The Regional Engineer and the Corps shall take all necessary steps in coordination to avoid duplication of inspections. Copies of the Corps' inspection reports will be furnished to the Regional Engineer within 30 days of the date of inspection. However, the Corps reserves the right to enter the construction site at any time to perform an inspection. Any construction deficiencies or difficulties detected by the Corps' inspections will be immediately reported to the Regional Engineer Upon review, the Regional Engineer will refer the matter to the Licensee or appropriate action. The Corps' inspector will report to the Regional Engineer or his representative regarding the need to stop construction while awaiting resolution of construction deficiencies or difficulties if such deficiency or difficulty would affect the integrity of existing project structures. In cases when construction practice or deficiency may result in an imminent danger to the integrity and safety of the existing project, the Corps inspector has the authority to stop construction while awaiting the resolution of the problem.

f. The completed licensed facilities will be inspected periodically by the Regional Engineer's staff to determine that the facility is being properly operated, maintained, and administered in conformance with license conditions. Copies of the reports of these inspections will be furnished to the Corps within 30 days of the date of inspection.

g. Portions of the licensed project works that may affect the integrity and operation of the Corps' project will be inspected and evaluated by the District Engineer as a separate item under the Corps' Periodic Inspection and Continuing Evaluation of Completed Civil Works Structures Program. Copies of the reports of these inspections will be furnished to the Regional Engineer within

30 days of the date of inspection. The Corps and the Commission will take all necessary steps in coordination to avoid duplication of inspections.

h. The Commission will require that the Licensee will assist the Corps District office by integrating the operation of the licensed hydroelectric facility into the Corps' emergency action plan.

i. In the interest of hydropower operation compatible with other authorized functions of the Federal project, the Commission, upon recommendation by the Corps, will require the Licensee to enter into a memorandum of agreement with the Corps describing the mode of hydropower operation acceptable to the Corps. The Regional Engineer shall be a party to these decisions. This memorandum of agreement shall be subject to revision by mutual consent of the Corps and Licensee as experience is gained by actual project operation. Should the Corps fail to reach an agreement with the Licensee, the matter will be referred to the OEPR for resolution. Copies of the signed memorandum between the Corps and the Licensee and any revision thereof shall be furnished to the OEPR and the Regional Engineer.

3. Access to the Project

The Commission will require the Permittee or Licensee to coordinate the development of its plans for access to the site during site investigation, construction, and operation with the Corps.

4. Annual Charge for the Use of Government Facilities

a. Pursuant to Section 10(e) of the Federal Power Act, the Commission is required to assess a reasonable annual charge for use of the Corps' facilities.

b. The Commission is considering the issuance of a rulemaking to establish a methodology for determining annual charges for use of government facilities. The Commission will seek the comments and recommendations of the Corps in the selection of the methodology for determination of the annual charges.

5. Coordination with the Commission on Corps' Regulatory Requirements Under Section 10 of the River and Harbor Act of 1899

a. The Corps' Section 10 requirements for power related activities are met through the Commission's licensing procedure including insertion of terms and conditions in the license in the interest of navigation. Section 4(e) of the Federal Power Act requires approval of plans by the Secretary of the Army from the standpoint of interests of navigation. This authority was delegated by the Chief of Engineers to respective Corps' Division Engineers on September 5, 1980.

PART II

NOW THEREFORE, to the extent that the Corps has responsibility under the provisions of Section 404 of the Clean Water Act, for projects under the Commission's jurisdiction, and with respect to the Commission's responsibility under the Federal Power Act, the Commission and the Army further agree to the following:

1. Lead Agency for Environmental Processes

a. If a Commission action involving an application for hydropower license or amendment thereto requires the review and approval by both the Corps and the Commission, the Commission will be the lead agency for environmental documentation pursuant to the procedures set forth below.

b. As soon as practicable within the licensing process involving the need for a Department of the Army permit, the Commission staff will advise the Corps of its environmental analysis. The evaluation by the Commission of impacts upon the environmental analysis. The evaluation by the Commission of impacts upon the environment of all reasonable alternatives will to the maximum extent legally possible satisfy the requirements of both the Commission and the Corps. The Corps will to the maximum extent legally possible accept Commission resolution of issues raised during the environmental processing in order to eliminate further review of such issues during the Corps' permit process.

c. The Commission will be responsible for environmental documentation which will demonstrate, where applicable and required by law, compliance with Federal environmental statutes.

d. As the lead agency, the Commission staff will:

(1) Determine whether a proposed license action is a major Federal Action significantly affecting the quality of the environment, or is "categorically excluded" from environmental documentation or is otherwise excluded from environmental requirements.

(2) When the Commission staff determines that the preparation of an EIS or an environmental assessment is necessary, it will coordinate with the Corps to ensure that such environmental documentation adequately covers the portion of the work requiring a Department of Army permit.

(3) Provide a copy of draft environmental documentation to the Corps for its information/comment.

(4) Attempt to resolve environmental issues raised in the draft environmental documentation prior to the approval of the final environmental documentation, or, if issues are not resolved, the lead agency position will to the maximum extent legally possible be accepted by the Corps.

(5) Provide the Corps with a copy of the final environmental documentation at the time the document is issued.

(6) To the maximum extent permitted by law and applicable regulations, the Corps will accept FERC's findings on all environmental and regulatory matters on activities requiring a Department of the Army permit.

2. Cooperating Agency

a. When an application requires both a FERC license and a Department of Army permit and the Commission determines that the project will require an EIS, the Corps will be provided an opportunity for input as a cooperating agency to ensure consideration of and compliance with its responsibilities in connection with the Clean Water Act.

b. To the maximum extent permitted by law and applicable regulations, the Department of the Army officials conducting their review will accept the Commission's determination regarding the public interest.

3. Public Hearings

Where public hearings are required by the Commission and the Corps, such hearings shall be conducted jointly unless such joint hearings are not feasible.

4. Department of the Army Permit

a. When review by the Corps is required by law, it will be limited to the geographic vicinity of the specific activity requiring a Department of Army permit. Unless required by law and applicable regulations, such review will not duplicate activities of any other Federal or State agency having jurisdiction on certain matters which otherwise might be reviewed by the Corps.

b. The Commission will inform the Corps at the time it receives an application for a FERC permit or license so that the Corps may evaluate whether or not a Department of the Army permit is required. If such an Army permit is required, the Corps will immediately notify the applicant.

c. Substantive comments relative to the Corps' public interest review will be furnished to the Commission and the applicant at the earliest possible date.

d. Unless precluded as a matter of law or procedures required by law, the Corps will issue any required public notice not later than fifteen days after receipt of all information required to complete the application for the preferred action.

e. Unless required by law and applicable regulation, the Corps will not insert special conditions in its permits without first consulting with the Commission concerning its conditions and will not duplicate effects of the Commission nor duplicate Federal, state, or local law or programs.

f. To the maximum extent practicable, the Corps will take action on its permit application not later than 90 days after

public notice is issued. The duration of the Department of the Army permit will be commensurate with the expected completion date of the proposed activity and the Corps will consult with the Commission prior to establishing necessary dates.

5. General Permits

The Corps has found the practice of issuing general permits on both a regional and nationwide basis to be an effective way to reduce duplication, paperwork, and delays. The Commission and the Corps agree to cooperate with this program to the extent that a Corps permit is required. To assist the Corps in its general permit program, the Commission staff will advise the Corps of potential cumulative impacts that may occur as a result of activities authorized by the Commission. The Commission staff will also assist the Corps in its program to develop additional general permits for the Commission's authorized activities.

PART III

NOW THEREFORE, the Commission and the Army further agree to the following:

1. Procedures for Exchange of Information Between the Corps and FERC

The Commission and the Corps will establish procedures as may be necessary to coordinate their activities and to keep each agency fully informed on the activities of the other.

2. Effective Date and Modification

This MOU shall become effective on the last signature date below, and shall remain in effect until it is terminated or renegotiated upon request by either party. If either party finds that its terms need to be modified or amended, the other party shall be notified in writing of the specific change(s) desired, with proposed language, and the reason(s) therefore. A proposed change shall become effective upon written mutual consent of both parties, and shall become a part of this MOU.

3. This MOU extends only to the specific issues enumerated herein and does not apply to other program responsibilities of the Corps of Engineers, the Department of the Army, or the Commission.

The above conditions are approved.

/s/ C. M. BUTLER	/s/ WILLIAM R. GIANELLI
Chairman, Federal Energy Regulatory Commission	Assistant Secretary of the Army (Civil Works)
2 Nov. 81	November 2, 1981
(Date)	(Date)